IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 33 of 1990

BHOJ RAJ
V/S
MANGAL DASS

Mr. SS PUROHIT, for the appellant / petitioner

Mr. NARENDRA THANVI for Mr. RK THANVI, for the respondent

Date of Order : 7.12.2006

HON'BLE SHRI N P GUPTA,J.

ORDER

This is defendant's appeal against the judgment and decree of the two learned courts below, decreeing the plaintiff's suit for eviction, on the ground of reasonable and bonafide necessity of the plaintiff, by deciding the question of comparative hardship and partial eviction respectively covered by issues no. 6, 7 and 11 against the appellant.

The facts of the case are, that on 18.5.1982 the plaintiff respondent filed a suit for eviction against the appellant, alleging interalia that he took the premises on rent and a rent note was executed on 17.7.75 agreeing to pay Rs. 400/- per annum as rent. Thereafter it was increased to Rs. 1000/-. It was also pleaded that the house was taken for personal residence only, and one underground

and Kothris in the Pathiyal were retained with the plaintiff. Then, the plaintiff pleaded the defendant to be defaulter in payment of rent, and claimed eviction on the grounds detailed in para-4 of the plaint, being defaulter, premises having become dilapidated, and the plaintiff requires reasonable and bonafide the premises for reconstruction of the premises for which he has got approved site plan from the Municipality, the defendant has caused substantial damage to the property, having damaged the latrine, and having done material alteration, and about the defendant obstructing the plaintiff in using the apartments retained by him. Then, non payment of electricity bill was also pleaded. Then, it was also pleaded that the plaintiff's son has come up of age, and he needs the premises for establishing his business, necessary facts about comparative hardship etc. were also pleaded. Interalia on these grounds the suit for eviction was filed.

The defendant contested the suit and admitted to have taken the premises on rent for one year at annual rent of Rs. 400/- on 17.7.75, but the rest of the pleading was denied. It was pleaded that rent from 17.7.76 to 31.12.76 has been paid, for which receipt was obtained. Then the defendant contended, that the stipulation, that after one year Rs. 1000/- will be charged, being panel rent but then the rent was continued to be agreed to be Rs. 400/-. Then it was denied that the premises were taken only for

residence, rather it was for godown, as the defendant has separate residence. Then, regarding the apartments retained by the plaintiff it was pleaded, that they were retained with the plaintiff, but key was given to the defendant. Then, rent was alleged to have been remitted by money order. Replying the grounds it was denied, that the defendant has committed default. Then, reasonable and bonafide necessity was also denied, it was denied that he has caused any damage to the property. However, the plaintiff is free to get the house repaired, and material alteration was also denied. The other allegations were also denied. It was pleaded, that his son is carrying on business with the plaintiff himself, and does not need any premises. Interalia with these averments it was prayed, that the suit be dismissed. Then, the plaintiff filed a rejoinder also, maintaining the pleading of the plaint.

The learned trial court framed as many as 11 issues. Issue no. 1 was about the defendant having taken premises on rent on 17.7.75 on the condition mentioned in para-2 of the plaint and having increased to Rs. 1000/- since 17.7.76. Then, issue no. 2 was about default. Issue no. 3 was about the premises being dilapidated, and the plaintiff requiring them to reconstruct. Then, issue no. 4 was about the defendant having caused substantial damage to the property. Issue no. 5 was about defendant's obstructing the plaintiff in user of the apartments retained by him.

Then, issue no. 6 was about reasonable and bonafide necessity for the plaintiff's son. Issue no. 7 was about comparative hardship. Then, issue no. 8 was about inconsistent user of the premises. Then, issue no. 9 was about the plaintiff's entitlement to arrears of rent. Then, issue no. 11 was about partial eviction which was subsequently framed on 27.2.87, and issue no. 10 was about relief. The learned trial court decided issue no.1 purportedly against the plaintiff, but in the manner that from the evidence it is established, that the house was taken at a rent of Rs. 400/- per annum, and increase of rent to Rs. 1000/- since 17.7.76 was not proved, and rather consequently issues no. 2 and 9 were also decided in favour of the defendant. Then, issues no. 4, 5 and 8 were also decided in favour of the defendant. However, issues no. 3, 6, 7 and 11 were decided in favour of the plaintiff, and consequently the suit was decreed.

In appeal the learned lower Appellate Court decided issues no. 1 and 2 together, and decided issue no. 2 partly in favour of the plaintiff, while finding on issue no. 1 was maintained. This was done by considering, that it is not necessary to assail the findings on the issues decided by the learned trial court against the plaintiff, by filing cross objections, even otherwise the Court can exercise power under O. 41 Rule 33. Then, finding on issue no.3 was maintained. Then, the findings on issues no. 4 and

5 were reversed by the learned lower Appellate Court: then the findings on issues no. 6, 7 and 11 were maintained, and the findings on issue 8 was partly reversed, and it was found, that the premises are being used for storing Kabar, and the premises require reconstruction for which the plaintiff has obtained permission. Then, finding on issue no. 9 was maintained.

Thus, in substance the relationship of landlord and tenant between the parties is not in dispute, and the two learned courts below have concurrently found the rent of rent to be Rs. 400/- per annum, and the suit has been decreed on the ground of reasonable and bonafide necessity covered, by issue no. 6, by deciding the question of comparative hardship and partial eviction covered by issues no. 7 and 11. Of course the findings on some of the issues, as noticed above, were reversed by the learned lower Appellate Court.

This appeal was admitted on 7.1.97, by framing following two substantial questions of law:-

> "1. Whether the field of occupation envisaged under Order 41 Rule 22 CPC and the field of occupation contemplated under Order 41 Rule 33 are independent of overlapping, if so, its effect ?
>
> 2. Whether the provisions envisaged under Order 41 Rule 33 cannot be obeyed without disobeying the provisions

contemplated under Order 41 Rule 22 ?”

In my view a proper comprehension of these two questions does show, that all that they comprehend is, as to whether without filing any cross objections, with respect to the finding, on issues, which have been decided against the respondent, by the trial court, it is open to the respondents, while arguing the appeal, to support the decree, to assail those findings, without filing cross objections under Order 41 Rule 22, and if such cross objections are not filed, the learned lower Appellate Court can still interfere with the findings, by invoking powers under O.41 Rule 23.

In my view, since it is the defendant's appeal, in a suit for eviction, the questions framed do not at all touch the findings of the two learned courts below, on the issues no. 6, 7, and 11, as questions framed rather comprehend the findings of the learned lower Appellate Court, only with respect to the issues on which the findings have been reversed, without cross objection.

That being the position, since the decree impugned, as passed by the learned trial court can be, and is required to be sustained, even on the findings recorded on issues no. 6, 7 and 11. Even if these two questions as framed are answered in favour of the appellant, or are

answered against the appellant, they hardly affect the net out come of the appeal.

Having gone through the record I do not find any sufficient ground to interfere with the findings of the learned courts below on issues no. 6, 7, and 11, in my second appellate jurisdiction, which are pure findings of fact.

In view of the above situation, the cross objections, filed by the plaintiff here, need not detain me and they are also required to be dismissed.

The net result is that the appeal and the cross objections have no force, and therefore both are dismissed. The parties shall bear their own costs.

At this stage, the request of the learned counsel for the appellant, the appellant is given one year's time to vacate the suit premises on the condition that the defendant gives an undertaking before the learned trial court within one month from today that on or before the expiry of the above period, he will peacefully hand over the vacant possession of the suit premises to the plaintiff and that during this period, he will not, in any manner, transfer the possession of the suit premises to anybody.

Likewise, the entire decreetal amount, so also all arrears of rent, if any, shall be deposited by the appellant in the trial court within one month from today and shall further continue to deposit amount equal to the monthly rent by way of damages for use and occupation by 15th of each succeeding month, till the actual delivery of possession. In case the appellant fails to comply with any of the above conditions, the respondent will become automatically entitled to execute the decree forthwith.

(N P GUPTA),J.

/Sushil/